BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41S-30000871 BY THOM FARMS	**)** **)** **)**	**FINAL ORDER**

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The Proposal for Decision in this matter was dated November 5, 2003. The Proposal was to deny the permit. The application sought 428 ac-ft/yr to provide full-service irrigation on 180 acres. Applicant Thom Farms, through its attorney Harley R. Harris, filed timely Exceptions and a request for oral argument that was received December 5, 2003. Timely Responses to the Exceptions were received from Objector David Morris, Objector Joe Simpson, and Objector Majerus Family Trust. An Oral Argument was held in Lewistown on February 19, 2004, with Mr. Harris arguing on behalf of the applicant and Objectors Joe and Betty Simpson, Chet Taylor, Leo Majerus, and Dave Morris appearing *pro se.*

Listed below are the Applicant's exceptions presented in writing (Nos. 1-7) and in oral argument (No. 8) with the Department's responses.

Exception No. 1. The "physical availability" prong of Mont. Code Ann. § 85-2-311 does not require an applicant to prove that water is available "during the entire requested period of appropriation."

The record shows that Staff Expert Russell Levens indicated in his October 21, 2002, memorandum to Andy Brummond

> "the data presented by the applicant do not support their conclusions that they can consistently produce 550 gallons per minute (gpm) from the pit. Mr. Thom's testimony at hearing about his early discussions with Mr. Andy Brummond on the application included: "Andy I said…where do we start…he says you've got to know how much water you are going to try to get and you have to somehow figure out whether or not your source is going to sustain that…. And Andy said, well, you'll have to pump it so you know what to apply for and whether it will sustain or what it'll do, so that's what we did that first year."

Applicant's consultant was informed in Staff Expert Levens' October 21, 2002, memorandum what is necessary to "determine the sustainable yield of the pit." Mr. Thom was told by Mr. Brummond that it must be shown that water availability must be sustained. Applicant was provided notice from the outset that sustainability of the water requested is an issue. Applicant is correct that the "season-long" term used by the Hearing Examiner in the Proposal is not in administrative rule. However, the applicant is statutorily required by the § 85-2-311(a) criterion to show that there is water physically available at the proposed point of diversion in the amount the applicant seeks to appropriate. It appears that Applicant interprets "in the amount the applicant seeks to appropriate" to mean only that the flow rate requested is available for any short duration, but not necessarily long enough to produce the volume of water requested over an irrigation season.

The Department interpretation is the same as the Department's requirements for an applicant for surface water. To show water is physically available a surface water applicant must show the amount of water you request is physically available at the proposed point of diversion during the period you intend to divert the water. In other words, it is not sufficient for an applicant to offer hydrologic proof for just one month when they are requesting water for six months – they must offer proof covering the entire six months. Similarly, ground water applicants must either test for the entire period they intend to appropriate, or, and more commonly, test to determine aquifer characteristics so they can extrapolate the required information for the entire period of use. Here, the Applicant's expert states that in his opinion water is physically available, at least for the pumping period, as shown by the two pumping tests, and that often one doesn't know for sure how long water will remain available until the water is actually pumped. The record here shows the Applicant did not sufficiently document pumping test results from either pumping test to allow Applicant's expert or the Department expert to project water availability beyond nine days. Here, the applicants test was not sufficient to allow

reasonable estimates of aquifer characteristics. If applicant had used a monitoring well close enough to measure drawdown, aquifer characteristics could have been estimated and measurements for the entire period of record might not have been necessary. The test results in the record only show water is physically available for nine (9) days.

In accordance with the above, Conclusion of Law No. 3 is modified to the following:

> 3. The Applicant has not proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate in the amount requested. Applicant's burden of a preponderance of the evidence must be met **prior** to issuance of any permit rather than after the fact. The Montana Supreme Court clearly recognized "the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights." *Montana Power Co. v. Carey*, 211 Mont. 91, 685 P.2d 336 (1984). Therefore, a permit cannot issue for more than what applicants prove by a preponderance of the evidence. The record shows availability for nine days of pumping and the water level returned to the static water level in four days. The record does not show what would happen after multiple repetitions of this pumping cycle. Applicant did not provide evidence of availability beyond the longest pumping test of nine days. Evidence of availability of water in the amount Applicant seeks to appropriate, that is, season-long, is not in the record. Therefore, physical availability has been shown only for a continuous nine-day pumping period. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact Nos. 4, 5.

Exception 2. The Hearing Examiner similarly, and inappropriately, required Thom Farms to demonstrate "legal availability" for the entire period of proposed use.

Objector Morris, Objector Simpson, and Objector Majerus Family Trust responded to the Applicant's exceptions. In general, the responses suggest the Objectors do not believe the record shows that senior downstream users will not be affected. Said another way, the Objectors have not seen evidence that the area of potential impact does not include their appropriations or sources that supply their appropriations.

Applicant states that pumping or aquifer testing by qualified professionals using accepted methodologies of a duration less that a whole "season" may be valid and

sufficient to establish legal availability and a lack of adverse effect to prior appropriators within the meaning of the statute. This is true. Here, the record shows Applicant performed a test that was poorly documented in the opinion of the staff expert and which did not convince the Hearing Examiner that the amount of water requested is legally available. I agree.

Applicant also references the draft Department "Guidelines For Test Wells And Aquifer Tests" and states these guidelines do not require season-long testing or evidence of season-long use. That same Department guideline states "Observation wells(s) should be completed in the same water-bearing interval as the proposed production well and **close enough to the production well so that drawdown Is measurable.**" (emphasis added). *See Guidelines For Test Wells And Aquifer Tests.* Item 2.c.iii. Applicant's consultant stated that because no drawdown was observed, there is no reliable way to project drawdown in wells. *See Proposal for Decision*, Finding of Fact No. 6. Observing no drawdown does not relieve Applicant of determining the existing legal demands within the area of potential impact and making a comparison with the water shown to be physically available. One cannot explain away a determination of the area of potential impact and a comparison of the existing legal demands with water shown to be physically available. Here, Applicant's consultant observed no drawdown in the observation wells, stated that without observed drawdown there is no reliable way to project drawdown in wells, and did not use his expertise to design a pumping test to determine the area of potential impact for the amount of water requested in the legal availability analysis. Applicant's consultant's opinion is that water is legally available because after nine days of pumping and 4 days of recharge the end result is zero drawdown in the pit, and this will hold true for each cycle. However, the pump test performed did not allow use of the data to project the drawdown after pumping the amount of water requested.

Applicant's exception implies that the statute requires only demonstration of legal availability for whatever period applicant decides to *test pump* the aquifer. The legal availability criterion states in part: "water can reasonably be considered legally available ***during the period*** **in which the applicant seeks to appropriate**, **in the amount requested**, based on the records…" *See* Mont. Code Ann. § 85-2-311(a)(ii). (emphasis added). Here, Applicant has not used a pumping test in which the aquifer characteristics could be determined through observable drawdown in an observation well, and then used to predict if water will be available during the proposed pumping time or used to predict what the area of impact from pumping the rate and **volume of water requested** will be. At best, Applicant has shown water is physically and legally available for the longest test pumping period, or nine (9) days, and even that documentation is minimal. In accordance with the above, Conclusion of Law No. 4 is modified to the following:

> 4. The Applicant has not proven that water can reasonably be considered legally available in the amount requested. Applicant did conduct a nine-day pumping test which shows water is legally available for nine days of continuous pumping. There is some information indicating the area of potential impact will not extend to other nearby appropriators. But, this conclusion is not supported by test data applied to a reliable distance-drawdown analysis method. Therefore, the period of known legal availability supported by the record is only nine days, not the period or amount requested by the applicant. The amount pumped in nine days can be calculated[1]. Nine days of continuous pumping at a flow rate of 550 gallons per minute amounts to a volume of 21.88 acre-feet. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact No. 6.

Excection 3. DNRC cannot insert a temporal element into Mont. Code Ann. §85-2-311, or otherwise apply a policy or interpretation that evidence of "season-long use" is necessary to meet the requirement of that statute, without first adopting the same through rulemaking.

An applicant has to show that the amount of water is physically and legally available in the amount requested, during the time it is requested, and under the diversion scheme proposed as discussed above. What is required by statute does not

[1] 550 gpm production for 9 days: ((550 gpm * 1440 min/day * 9 days)/ 325851 g/af) = 21.875 acre-feet

have to be adopted in administrative rule. The Department has ruled on this matter in other cases. See generally In the Matter of Application For Beneficial Water Use Permit No. 63456-s41I by Norman R. Bruce, Final Order (1988); In the Matter of Application for Beneficial Water Use Permit No. 92024-g40C by Ericka and Keith Nelson, Final Order (1995). No changes will be made to the Proposal based on this exception.

Exception 4. The "plan for exercise" requirement in Mont. Code Ann. § 85-2-311(1)(b) is not intended to displace the priority system and is only applicable where an applicant's or objector's evidence shows a reasonable potential for adverse effect on prior rights.

The Hearing Examiner's requirement for a "plan" is based upon the determination that the area of potential impact was not determined. It is true as Applicant states that a plan can be as simple as shutting off a ground water pump when a senior appropriator is adversely affected. With ground water, shutting off a pump may, or may not, allow a senior user to begin appropriating again after being affected. Time may be needed to recharge the aquifer at the senior's diversion point. Here, Applicant did not provide a plan as required by statute, but only provided sketchy documentation for the argument that no plan was needed.

In the legal availability exception Applicant alludes to testimony regarding an alleged plan to pump for 132 days out of a 183 day period. The testimony of Applicant's consultant regarding non-pumping time was not offered in the context of a plan, but instead, that 320 acre-feet can be pumped at the requested rate in 132 days which leaves 51 days of non-pumping. No changes will be made to the Proposal based on this exception.

Exception 5. The Hearing Examiner erroneously concluded that the underlying policy behind the Water Use Act is to preserve the status quo.

The Water Use Act is intended to protect senior appropriators and have new applicants prove their case by a preponderance of the evidence. If an applicant does not prove the statutory criteria by a preponderance of the evidence, the status quo remains. No changes will be made to the Proposal based on this exception.

Exception 6. The Hearing Examiner erroneously concluded that immeasurable, hypothetical impacts to surface water sources were a sufficient basis to deny the application.

Finding of Fact No. 9 was not used in the Proposal to conclude the Application should be denied because the aquifer contributes to the base flow of the Ross Fork or the Judith River in an unknown amount. Instead, Finding of Fact No. 9 states the potential area of impact and the effects within that area of season-long pumping *are not known*. The Hearing Examiner concluded there was insufficient evidence to assess the ability of prior appropriators to exercise their rights because the area of potential impact from taking the amount requested is not known. No changes will be made to the Proposal based on this exception.

Exception 7. The Hearing Examiner's conclusion that he could not issue a conditional permit is both legally erroneous and unfair to Thom Farms.

Applicant's exception implies that the Hearing Examiner believes Applicant's tests were inadequate in length, and Applicant should be issued a conditional, or interim, permit to allow use for a season to rebut doubts, concerns and suppositions about season-long use. Here, it is not the length of the test that the Hearing Examiner found inadequate. Rather, the *test* Applicant performed was not adequately documented so it could be reviewed by the Staff Expert to confirm what it sought to prove because it was not adequate to determine aquifer characteristics which could be used to estimate the area of potential impact when the volume of water requested is removed from the

aquifer. Had the Applicant availed themselves of a reliable, documented, test which resulted in a determination of the potential area of impact, it is possible that an interim permit could have been issued pending confirmation of the area of impact. If the permit criteria are not met, a permit cannot issue. A permit can issue only on the basis of what has been proven regarding physical and legal availability, and lack of adverse effect, and cannot issue on the basis of evidence that might be forthcoming. No changes will be made to the Proposal based on this exception.

Exception 8. The Hearing Examiner erred in applying the "preponderance of evidence" standard when weighed against the "questions" posed by the staff expert.

The Hearing Examiner appointed the staff expert to "offer his credentials, be called by any party or the Hearing Examiner to be cross-examined on his memorandum to the file, and to assist the Hearing Examiner in evaluating evidence presented by the parties. Nothing in this notice shall prevent a party from producing other expert evidence or rebuttal to Mr. Russell Levens comments." The Department staff apprised applicant in prehearing communications that sustainability was not shown. The Department of Natural Resources and Conservation is an agency of expertise. It is Mr. Levens expert status that allows the Hearing Examiner to use Mr. Levens' questions when evaluating the evidence before him. Here, Mr. Levens questioned the adequacy of the documentation of the tests that were performed in this matter and then used by Mr. Baldwin to conclude water is physically available during the period of appropriation, and the area of potential impact will never advance beyond what it was after the 115-hour test and the 9-day test. The agency's experience, technical competence, and specialized knowledge may be utilized **in the evaluation of evidence**. Mont. Code Ann. § 2-4-612(7). Applicant only provided an undocumented expert opinion stating the rate requested is sustainable **in the amount Applicant seeks to appropriate**, and what the area of potential impact is **for the amount requested during the period** in which the

Applicant seeks to appropriate. The Department's Staff Expert's analysis disclosed that the data from the 115-hour test does not support the conclusion that the pit can consistently produce 550 gpm. No changes will be made to the Proposal based on this exception.

The Applicant in this case provided "some" data and analysis with respect to the criteria, and believed that because the objectors provided little contravening data and analysis, that applicant had met its burden in terms of a preponderance of evidence. The Applicant knew that the Department was not confident in the application's analysis and additional information was requested from the Department's regional staff and other experts. Yet it chose to go before an impartial Hearings Officer with what it had, as was the applicant's right. In this case, the Hearings Officer agreed with the staff, as do I. The Department is not merely a *tabula rasa* upon which applicants and objectors are expected to provide their evidence, and then weigh that evidence as though it has no internal knowledge or expertise in evaluating that evidence and interpreting the intent of the law.

Applicants would have been better advised to heed the suggested data collection, testing methods and analyses proposed by Department staff. Indeed, it is usually wise to seek a consultation with Department staff on what methods and analyses may be necessary to convince them that the criteria can be met prior to designing the tests and purchasing the irrigation equipment.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law, as modified herein, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 41S-300087100 by Thom Farms is **DENIED.**

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 1st day of May, 2004.

/Original signed by R. Curtis Martin/
R. Curtis Martin
Department of Natural Resources and Conservation
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of this **Final Order** was served upon all parties listed below on this 1st day of May, 2004 by first class United States mail.

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